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No. 94-785

In the

SUPREME COURT OF THE UNITED STATES

October Term 1994

JEAN JOSEPH DEEB,
petitioner,

v.

UNITED STATES OF AMERICA,
respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY

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REPLY

Three points in the Brief of the United States in Opposition merit reply:

1. Although doubtless inadvertent, the Brief in Opposition misstates the facts at one point in a way that is material. At no time was petitioner Deeb (or Biamby) in the van that contained the drugs. *All* accounts given agree that Deeb was the driver of the white Jeep Cherokee throughout, including the account given at pages 5-6 in the Brief for the United States filed in the Court of Appeals. At no point prior to his arrest did Deeb get out of the Jeep while it was at or near the duplex apartment. The arrest occurred when *Gomez-Gallago*, the passenger who had been in the Jetta with Cadavid, got into the van and began to drive it away from the duplex apartment, where it had been parked without being occupied or moved since its arrival and the initial unloading. The testimony of Deeb, Biamby, and the government agents who observed the events were consistent on these points. The assertion at the top of page 3 of the Brief in Opposition is wrong and cannot be supported from the record.

Counsel for petitioner notes this error to eliminate the

possibility that the Court might be misled about the significance of Biamby's former testimony. Apart from that testimony, the evidence against Deeb was entirely circumstantial. The government's case against him was largely a "mere presence and association" case. The only other evidence supporting an inference that Deeb was a participant in the alleged schemes was Agent Gonzalez's testimony that Deeb had spoken with the occupants of the Jetta and the evidence of Deeb's pre-trial "flight". The government acknowledged at trial that the former testimony was central to its case and made no claim on appeal that any error in its admission could viewed as harmless. The issues presented by the petition will be properly before the Court for decision if review is granted in this case.[1]

2. The government misperceives the nature of the arguments advanced by petitioner in at least three respects.

a. Given the legislative history as well as the language of Rules 804(b)(1) and 804(b)(5), petitioners argument that Rule 804(b)(5) could not properly be used by the courts to evade Congress's reasoned decision to reject the former testimony rule in the form submitted by the Court was a "direct hit" rather than a "near miss" argument. See Pet. at 7-10, 16-19; cf. Opp. at 8-11. That the court of appeals in this case

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[1] There is a further point that should, in fairness, be noted. Mr. Deeb has maintained his innocence throughout. In the trial court he took the stand. He explained his association with Biamby and his presence on the day. He explained his flight. He denied that it had been him who had spoken with the occupants of the Jetta and, given the circumstances of Agent Gonzalez's surveillance, his denial was plausible. The government was and is entitled to have the evidence viewed most favorably to the verdict; it is not, however, entitled to more. The possibility that an innocent man may have been sentenced to serve more than 22 years in prison may not be relevant to the decision whether the case merits review by the Court; but the potential consequences of an error of the kind presented here surely are.

sought to utilize evolving "near miss" doctrine to avoid the effect of a clear congressional directive enhances the importance of this case and emphasizes the need for this Court to provided guidance on the scope of the "Other Exceptions" authorized by Rule 804(b)(5).

b. Biamby was an alleged accomplice. He gave his testimony pursuant to a plea bargain. He sought future benefits that depended upon the government's appraisal of the value of his testimony. Those were the circumstances in which his former testimony was given and which gives this case its constitutional importance. This Court has consistently rejected any decision that authorized the admission of hearsay statements made by an unavailable accomplice-declarant after his or her arrest. The government's Brief in Opposition ignores the specific circumstances which makes this case constitutionally important and which create an apparent conflict between the decision below and the principles this Court declared and applied in *Bruton v. United States*, 391 U.S. 123 (1968), and *Lee v. Illinois*, 476 U.S. 530 (1986), and recently reaffirmed in *Williamson v. United States*, 114 S. Ct. 2431 (1994). See Pet. at 19-23; cf. Opp. at 12-14.

c. Petitioner did not rely "on *Coy [v. Iowa]* to assert a right to confront Biamby at trial." Opp. at 13. He suggested and reiterates that this Court's decisions construing the Confrontation Clause could "fairly be read as establishing a clear and easily administered rule: former testimony given by an accomplice-declarant implicating an accused may only be admitted as evidence at the trial of the accused if the accused had an opportunity to confront the declarant and to develop the testimony by examination or cross-examination at the hearing at which it was given." Pet. at 22. *Coy v. Iowa*, 487 U.S. 1012 (1988), was cited solely to develop the foundation for that point. Id. The Brief in Opposition does not address the point or the foundation; instead it appears to use that reference

(Opp. at 13) as a vehicle for reintroducing a modified version of the waiver argument urged below, an argument that the court of appeals correctly rejected (App. 7a-8a and note 1), a ruling that the government has not challenged here.

3. The government accurately reports that the issues presented in this case are similar to those decided in *United States v. Clarke*, 2 F.3d 81 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1194 (1994). In contrast the view suggested by the government, Petitioner submits that the fact that the question whether, and if so, in what circumstances, former testimony may be admitted under Rule 804(b)(5), when it is inadmissible under Rule 804(b)(1) or any of the other "firmly rooted" exceptions to the hearsay rule, is a recurring question enhances, rather than diminishes, the importance of the issues presented here.[2]

Moreover, the constitutional issues presented here differ from those presented in *Clarke* in ways that enhance their suitability for review by the Court. The accomplice-declarant in *Clarke* was the accused's brother. He had given the challenged testimony at a hearing on a suppression motion in a case that the government had brought against him alone. He neither sought nor could have gained a benefit from testifying against his brother. He was unavailable because he refused to

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[2] The unpublished disposition in *United States v. Tucker*, 965 F.2d 1163 (table), 1992 Westlaw 44813 (4th Cir. 1992), reinforces the conclusion that the Court should address the underlying issue promptly. There the United States Court of Appeals for the Fourth Circuit upheld the admission of immunized, accomplice grand jury testimony under Rule 804(b)(5). The decision suggests that that court now views its position on an issue that has long divided the circuits as so firmly established that decisions on the point do not merit publication. Maintaining confidence in the integrity of the federal court system suggests that the Court can not long defer acting to resolve the conflict.

testify against his brother at the brother's trial. In that case, it was the lack of motive to lie and indicia of reliability other than the presence examination and cross-examination by the parties to the prior action which the court of appeals analyzed and emphasized in its opinion. Those circumstance made it possible for the court to engage an analysis of the circumstances that paralleled the apparent mandate of *Idaho v. Wright*, 497 U.S. 805 (1990). Those circumstances are not present in this case.

The number of criminal cases in which the admission of evidence under Rule 804(b)(5) is being upheld and the extent to which the proper application of that rule has divided the circuits make it clear that the Court will have to accept one or more cases to provide the guidance necessary to assure a uniform and proper application of that rule in criminal cases that come before the federal courts. Petitioner submits that the present case presents the Court with an appropriate vehicle for undertaking important task.

CONCLUSION

The Court should issue a writ of certiorari to review the judgment of the court of appeals in this case for the reasons developed in the initial petition and in this reply.

Respectfully submitted

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